



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Larry Latham Auctioneers, Inc.--Request for
Reconsideration

File: B-229917.10

Date: January 13, 1989

DIGEST

Request for reconsideration of decision sustaining agency's improper award to incumbent contractor is denied where the incumbent contractor fails to show any error of fact or law that would warrant reversal of or modification of prior decision, reiterates arguments raised initially, and merely expresses disagreement with the original decision.

DECISION

Larry Latham Auctioneers, Inc., requests reconsideration of our decision Kaufman Lasman Associates, Inc., B-229917.9, Oct. 21, 1988, 88-2 CPD ¶ 381, in which we held that the Veterans Administration (VA) improperly awarded a contract under request for proposals (RFP) No. 26/101/2 to Latham, the incumbent contractor, for auctioneering services in connection with the sales of single family properties owned by VA. We deny the request for reconsideration.

The procurement by VA has been the subject of numerous protests to our Office. On December 10, 1987, VA made award under the RFP to Latham based on initial proposals. VA later determined that award on the basis of initial proposals was improper under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (Supp. IV 1986). VA decided to hold discussions, request best and final offers (BAFO) from all offerors in the competitive range and, if appropriate, terminate Latham's contract. We upheld VA's decision in Kaufman Lasman Associates, Inc., et al., B-229917 et al., Feb. 26, 1988, 88-1 CPD ¶ 202, aff'd on reconsideration, B-229917.3, Mar. 16, 1988, 88-1 CPD ¶ 271. While the procurement was ongoing, however, VA allowed Latham to perform under the original award. The firm conducted a substantial number of auctions with sales volume exceeding \$25 million.

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The RFP provided that proposals would be evaluated on the basis of technical considerations (worth 85 of 100 total points) and price (worth 15 points). With regard to price, the RFP required offerors to specify a percentage fee to be paid by VA based on two increments of property sales volume. The fee for the first increment would apply for all sales over \$20 million in any calendar year. The offeror in the competitive range with the lowest price would receive the entire 15 points. Other offerors in the competitive range would receive a percentage of the 15 points based on the proportional difference between their offers and the lowest priced offeror within the competitive range.

Seven offerors, including Kaufman and Latham, submitted BAFOs. With regard to technical considerations, Latham received the highest technical score; Kaufman received the second highest technical score, approximately 1 point below Latham's score. The contracting officer determined that in view of the slight difference in the scores, Kaufman's and Latham's technical proposals were substantially equivalent. Kaufman's evaluated price was slightly lower than Latham's evaluated price. When the price and technical points were combined, Latham received the highest combined score, 89.11 points, and Kaufman received the second highest combined score, 88.85 points.

In relevant part, section M of the solicitation provided as follows:

"The offeror with the highest combined point total (Maximum 100) and who has been determined to be responsible by the Contracting Officer will be awarded the contract. However, if VA finds offers in the highest end of the competitive range are essentially equal, the award may be made to an offeror receiving one of the highest total scores, (i.e., technical evaluation, plus price) which offers the lowest price."

While Kaufman's price was lower than Latham's based on the price evaluation formula in the RFP, the contracting officer concluded that awarding to Kaufman actually would be significantly more costly than allowing Latham to continue performing, due to the cost advantage derived under the RFP's incremental pricing formula from Latham's interim performance of the auction services while the procurement was ongoing. The contracting officer also concluded that a new award to Kaufman would impose an additional administrative burden on VA since VA personnel did not have any experience working with Kaufman; however, no monetary amount was attributed to this administrative burden. The

contracting officer then determined that award to Latham would result in the lowest price based on the additional expenses VA would incur if award were made to Kaufman. Accordingly, VA allowed the award to Latham to stand.

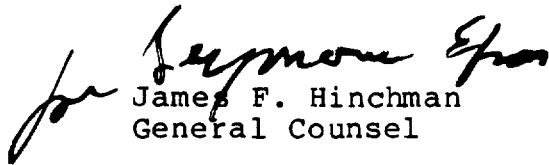
We concluded that it was improper for the contracting officer to consider Latham's incumbent cost advantage in making the selection decision, particularly since the initial award from which the advantage derived was improper, as VA itself recognized. Instead, in view of his determination that Kaufman and Latham were essentially equal technically, we found that it was an abuse of discretion for the contracting officer not to make award to Kaufman as the lowest priced offeror based on the price-related factors set out in the RFP. Accordingly, we sustained the protest, but given that the base period under Latham's contract was to expire in December 1988, we concluded that it was not appropriate to recommend termination of Latham's contract. Instead, we recommended that VA refrain from exercising any of the options under the contract and instead conduct a new procurement for its future needs. In addition, we found that Kaufman was entitled to recover its proposal preparation costs and the cost of filing and pursuing the protest, including attorneys' fees.

In its request for reconsideration, Latham argues as it did in the protest that based on the language in the RFP which states award will be made to the offeror with the highest combined point score, it was entitled to receive award under the contract since its combined technical and price score of 89.11 points was higher than Kaufman's combined score of 88.85 points. Latham also reiterates its argument that the contracting officer was not precluded from considering Latham's incumbent cost advantage in deciding whether to exercise his discretion under the RFP to award to other than the highest scored offeror.

To obtain reversal or modification of a decision, the requesting party must convincingly show that our prior decision contains either errors of fact or of law or information not previously considered warranting reversal or modification. 4 C.F.R. § 21.12(a) (1988); Idaho Norland Corp.--Reconsideration, B-230598.2, Aug. 1, 1988, 88-2 CPD ¶ 103. Repetition of arguments made during the resolution of the original protest or mere disagreement with our decision does not meet this standard. Id. Here, Latham essentially reiterates its original arguments raised during the protest which we have already considered and rejected.

In any event, the critical fact ignored by Latham in arguing that our initial decision was erroneous is that the contracting officer in effect concluded that the technical differences between Latham's and Kaufman's proposals provided no basis for distinguishing between the two on technical grounds. Under these circumstances, we found that it was an abuse of discretion for VA to select Latham, the higher priced of the two technically equal offerors, based on a cost advantage unrelated to the price factors set out in the RFP and derived by Latham from an improper initial award. We see no basis to disturb our finding.

The request for reconsideration is denied.


James F. Hinchman
General Counsel